

ORAL ARGUMENT NOT YET SCHEDULED

**No. 13-5252**

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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NATIONAL ASSOCIATION OF MANUFACTURERS,  
CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, and  
BUSINESS ROUNDTABLE,

Appellants,

v.

SECURITIES AND EXCHANGE COMMISSION,

Appellee,

AMNESTY INTERNATIONAL USA and AMNESTY INTERNATIONAL LTD.,

Intervenors.

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On Appeal from the United States District Court  
for the District of Columbia

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**BRIEF OF THE SECURITIES AND EXCHANGE COMMISSION,  
APPELLEE**

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## **CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES**

### **A. Parties and Amici**

Except for the following, all parties, intervenors, and amici appearing before the district court and in this Court are listed in the Brief for Appellants:

#### Additional Amici for Appellants:

American Petroleum Institute

Retail Litigation Center, Inc.

### **B. Rulings under Review**

References to the rulings at issue appear in the Brief for Appellants.

### **C. Related Cases**

This case was previously before this Court as *Nat'l Ass'n of Mfrs. v. SEC*, No.12-1422, on a petition for review of Rule 13p-1 under the Securities Exchange Act of 1934. After the Court held in *American Petroleum Institute v. SEC*, 714 F.3d 1329 (D.C. Cir. 2013), that it lacked jurisdiction over such petitions, the case was transferred to the district court pursuant to 28 U.S.C. 1631. Counsel is not aware of any other related cases currently pending in this, or any other, Court.

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## GLOSSARY

Academics Br.	Brief of <i>Amicus Curiae</i> Experts on the Democratic Republic of the Congo in Support of Appellants
Adopting Release	<i>Conflict Minerals</i> , 77 FR 56,274 (Sept. 12, 2012)
APA	Administrative Procedure Act
API Br.	Brief of American Petroleum Institute as <i>Amicus Curiae</i> on Behalf of Appellants and Supporting Reversal of the District Court's Order
Br.	Opening Brief of Appellants National Association of Manufacturers, Chamber of Commerce of the United States of America, and Business Roundtable
Commission or SEC	Securities and Exchange Commission
Conflict minerals	Coltan, cassiterite, wolframite, gold or their derivatives, as well as any other minerals or their derivatives that the State Department determines to be financing conflict in the Democratic Republic of the Congo or an adjoining country. <i>See</i> Dodd-Frank Section 1502(e)(4).
Conflict Minerals Report	The report required by Section 13(p)(1)(A) of the Securities Exchange Act of 1934
Covered Countries	The Democratic Republic of the Congo or an adjoining country
Dodd-Frank	Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, 124 Stat. 1376 (2010)

**GLOSSARY (CONTINUED)**

DRC	The Democratic Republic of the Congo
Exchange Act	Securities Exchange Act of 1934
FR	Federal Register
Indus. Br.	Industry Coalition Amici Brief in Support of Appellants
OECD	Organisation for Economic Co-operation and Development
Retail Br.	Brief of the Retail Litigation Center, Inc. and the National Retail Federation as <i>Amici Curiae</i> in Support of Appellants

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BRIEF OF THE SECURITIES AND EXCHANGE COMMISSION,  
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**PRELIMINARY STATEMENT**

In enacting Section 1502 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank”), Congress concluded that “the exploitation and trade of conflict minerals” was “contribut[ing]” to a humanitarian crisis in the Democratic Republic of the Congo (“DRC”). Congress determined

that this crisis “warrant[ed]” new disclosure requirements concerning “conflict minerals” originating in the DRC or an adjoining country (“Covered Countries”), and directed the Commission to promulgate rules embodying those requirements. The Commission adopted Rule 13p-1 under the Securities Exchange Act of 1934 (“Exchange Act”) to carry out that mandate.

Appellants’ challenges to Rule 13p-1 are premised on the novel and flawed assumption that the Commission should have re-evaluated Congress’s determination that the disclosures would ameliorate, rather than exacerbate, the crisis in the DRC. This erroneous contention animates appellants’ arguments that the Commission was required to use its exemptive and interpretive authority to reduce the statute’s costs even where the Commission reasonably concluded that doing so would undermine Section 1502’s purpose. It also underpins their arguments that the Commission could not implement Congress’s directive unless it confirmed Congress’s judgment that the statute would yield benefits, and that each regulatory choice made by the Commission had to be weighed against its ultimate effect in the DRC. Appellants’ position misconceives both the Commission’s role in mandatory rulemakings and its approach to *this* rulemaking.

In enacting Section 1502, *Congress* determined that the required disclosures will benefit the DRC. The Commission properly declined to second-guess that



judgment and instead weighed whether its choices would provide the disclosure that *Congress* determined would further its humanitarian goals.

And far from pursuing these goals at all costs, as appellants assert, the Commission expressly endeavored to “reduce the burden of compliance ... while remaining faithful to the language and intent of Section 1502.” In the few circumstances where the Commission did not accept recommendations to lower costs, it determined that the recommended alternatives would undermine the scheme Congress envisioned. These conclusions were reasonable in light of the statutory language, congressional purpose, and evidence in the administrative record. And given Congress’s mandate, the Commission’s analysis was appropriate under the Administrative Procedure Act (“APA”) and the Exchange Act.

### **COUNTERSTATEMENT OF ISSUES**

1. Did the Commission act reasonably in (a) declining to include a categorical *de minimis* exception where such an exception would thwart the purpose of the statute; (b) including issuers that contract to have products manufactured and have some actual influence over that manufacturing where failing to do so would undermine Section 1502’s purpose; (c) requiring issuers with a reason to believe their conflict minerals may have originated in the Covered Countries to perform

due diligence; and (d) adopting a longer transition period for smaller issuers than for larger issuers?

2. Did the Commission's economic analysis, which accepted Congress's determination that disclosure would yield benefits in the DRC, provided a quantitative analysis of the rule's costs, and analyzed qualitatively the costs and benefits of its discretionary decisions, comply with the APA and the Exchange Act?

3. Do Section 1502 and Rule 13p-1 violate the First Amendment by requiring issuers to disclose factual information about their products?

### **STATUTES AND REGULATIONS**

Pertinent statutes and regulations are contained in the appellants' Addendum.

### **COUNTERSTATEMENT OF THE CASE**

#### **A. Nature of the Case**

To further its humanitarian goal of promoting peace and security in the DRC, Congress enacted Section 1502 of Dodd-Frank, 124 Stat. 1376, 2213-18 (2010), which uses securities law disclosures to bring greater public awareness of the source of issuers' conflict minerals and promote the exercise of due diligence on conflict mineral supply chains. *See Conflict Minerals*, 77 FR 56,274 (Sept. 12,

2012) (“*Adopting Release*”) (JA0720/2-3).<sup>1</sup> Section 1502 adds Section 13(p) of the Exchange Act, 15 U.S.C. 78m(p), which directs the Commission to promulgate rules requiring these disclosures. The Commission adopted Rule 13p-1, 17 C.F.R. 240.13p-1, pursuant to that mandate. JA0720/1.

Appellants initially petitioned for review of the rule in this Court. While that appeal was pending, the Court held in *American Petroleum Institute v. SEC*, 714 F.3d 1329 (D.C. Cir. 2013), that it lacked original appellate jurisdiction over certain petitions for review of Commission rules. As a result, this case was transferred to the district court, which rejected all of appellants’ challenges.

## **B. Background**

### **1. Conflict Minerals and the DRC**

The DRC is “a vast, mineral-rich nation.” U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-12-763, CONFLICT MINERALS RULE: SEC’S ACTIONS AND STAKEHOLDER-DEVELOPED INITIATIVES 3 (2012). After the overthrow of an authoritarian regime in 1997 (*id.* at 3-5), “one of the deadliest conflicts since World War II” erupted in the DRC. DRC Relief, Security, and Democracy Promotion Act of 2006, PL 109-456, § 101(7) (“2006 DRC Act”). The conflict,

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<sup>1</sup> “Conflict minerals” are coltan, cassiterite, wolframite, gold, their derivatives, or other minerals or their derivatives the State Department determines to be financing conflict in the Covered Countries. Section 1502(e)(4).

which has “spawned some of the world’s worst human rights atrocities” (2006 DRC Act § 101(5)), continues to this day. The illegal exploitation of conflict minerals in eastern DRC fuels this conflict by “facilitat[ing] the purchase of small arms to commit abuses and reduc[ing] government revenues needed for increasing security and rebuilding the country.” U.S. Department of State, 2011 Human Rights Report for the DRC 15. In response to this crisis, the United Nations Security Council has long condemned the exploitation of the DRC’s natural resources and encouraged due diligence regarding the origin of conflict minerals. U.N. Security Council Resolutions 1376 ¶¶8 (2001), 1698 ¶¶6 (2006), 1857 ¶¶15 (2008), 1896 ¶¶¶7, 14 (2009), 1952 ¶¶¶6-9 (2010).

Congress has also considered responses to the crisis in the DRC. *See* GAO-12-763 at 5-6; *Adopting Release*, JA0720/2-3 n.12. In 2006, for example, Congress enacted legislation declaring that United States policy should be to “make all efforts” to ensure that the government of the DRC “is committed to responsible and transparent management of natural resources across the country.” 2006 DRC Act § 102(8)(A). Pursuant to this Act, the United States allocated hundreds of millions of dollars for humanitarian aid, debt relief, training, and other assistance to the DRC. *See generally* U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-08-188, THE DEMOCRATIC REPUBLIC OF THE CONGO: SYSTEMATIC ASSESSMENT IS

NEEDED TO DETERMINE AGENCIES' PROGRESS TOWARD U.S. POLICY OBJECTIVES

(2007); Under Secretaries of State Robert D. Hormats and Maria Otero, Statement Concerning Implementation of Section 1502 of the Dodd-Frank Legislation Concerning Conflict Minerals Due Diligence 3 (July 15, 2011).

The Senate subsequently considered two bills targeting the illicit minerals trade in the DRC. The first would have banned importing certain products that contained or were derived from coltan or cassiterite originating in the DRC. *See* Conflict Coltan and Cassiterite Act of 2008, S. 3058, 110th Cong. (2008). The second would have required companies using coltan, cassiterite, or wolframite to disclose annually to the Commission the origin of those minerals. *See* Congo Conflict Minerals Act of 2009 ("2009 DRC Act"), S. 891, 111th Cong. § 5 (2009).

In explaining the change to a disclosure approach, one co-sponsor of the 2009 DRC Act stated that "we must tread carefully.... All-out prohibitions or blanket sanctions could be counterproductive and negatively affect the very people we seek to help.... [T]his bill is sensitive to that complex reality." 155 Cong. Rec. S4697 (daily ed. Apr. 23, 2009) (statement of Sen. Feingold). He added that "[b]ringing transparency to those supply chains may not be easy, but it is something we can and should expect of industry." *Id.* Another co-sponsor stated that "[s]ome in industry have already started down this road and are even in front

of the curve with their efforts, but we still need to do a better job of showing transparency.” *Id.* at S4696 (statement of Sen. Brownback).

## **2. Section 1502**

Section 1502 of Dodd-Frank was modeled on the 2009 DRC Act. *See* 156 Cong. Rec. S3976 (daily ed. May 19, 2010) (statement of Sen. Feingold). It states that the use of conflict minerals to fuel the humanitarian crisis in the DRC “warrant[s]” the provisions of Section 13(p) of the Exchange Act, which it adds. Section 13(p) directs the Commission to promulgate rules requiring issuers to disclose annually whether conflict minerals “necessary to the functionality or production of a product manufactured by” them originated in the Covered Countries. Exchange Act § 13(p)(1)(A), (2)(B). Where “such conflict minerals did originate in” the Covered Countries, issuers must submit a report to the Commission (“Conflict Minerals Report”) (*id.*) and make the report available on their websites (*id.* § 13(p)(1)(E)).

Section 13(p) specifies that the Conflict Minerals Report must include “a description of the measures taken by [the issuer] to exercise due diligence on the source and chain of custody of such minerals,” including “an independent private sector audit” of the report. *Id.* § 13(p)(1)(A)(i). The report must also include, among other things, “a description of the products manufactured or contracted to

be manufactured that are not DRC conflict free,” with “DRC conflict free” defined to mean “products that do not contain minerals that directly or indirectly finance or benefit armed groups in the” Covered Countries. *Id.* § 13(p)(1)(A)(ii). The disclosure requirements terminate if at any time after five years from enactment the President certifies that “no armed groups continue to be directly involved and benefitting from commercial activity involving conflict minerals.” *Id.* § 13(p)(4).

Section 1502 also requires other federal agencies to report to Congress regarding conditions in the DRC and the effectiveness of the disclosure regime. The Comptroller General must submit annual reports assessing “the rate of ... violence” and “the effectiveness of section 13(p) ... in promoting peace and security” in the Covered Countries. Section 1502(d). And the Secretary of State must produce and make publicly available a map of “mineral-rich zones, trade routes, and areas under the control of armed groups” in the Covered Countries, as well as submit to Congress “a strategy to address the linkages between human rights abuses, armed groups, mining of conflict minerals, and commercial products.” Section 1502(c)(1)(A), (c)(2)(A)(i)-(ii).

### **3. Rule 13p-1**

After soliciting and receiving comments, the Commission proposed rules to implement Section 1502. *Conflict Minerals*, 75 FR 80,948 (Dec. 23, 2010). After

both extending the comment period and holding a public roundtable, the Commission received approximately 420 individual comment letters, more than 13,000 form letters supporting Section 1502, and petitions with more than 25,000 signatures supporting the proposal. *Adopting Release*, JA0722/3-JA0723/1 & n.32. The Commission adopted the final rule, Rule 13p-1, on August 22, 2012.

**a. The Commission exercised its discretion to reduce the rule's burdens where doing so would not undermine the statute's purpose.**

Rule 13p-1 establishes a three-step process for compliance. Recognizing that the rule would “impose significant compliance costs on companies who use or supply conflict minerals” (*Adopting Release*, JA0724/1-2), the Commission modified the proposed rules to reject several more costly alternative proposals and accept numerous recommendations to reduce compliance burdens. But the Commission determined that some recommended alternatives, including those appellants advocate, would undermine the scheme Congress envisioned.

**i. Step one**

The Commission made several threshold determinations limiting the rule's scope. For example, rejecting the views of two co-sponsors of Section 1502, the Commission limited the final rule to reporting issuers. *Adopting Release*, JA0731/2, JA0732/2-3. The Commission also limited the rule's scope to gold and



the most common derivatives of coltan, cassiterite, and wolframite—tin, tantalum, and tungsten—unless the Secretary of State determines that additional derivatives should be included. JA0730/2. Moreover, conflict minerals outside the supply chain prior to January 31, 2013, are excluded from the rule. JA0752/1.

The Commission also narrowly interpreted the statutory standard triggering the rule’s requirements—that conflict minerals be “necessary to the functionality or production of a product.” *Adopting Release*, JA0740-JA0742. To mitigate concerns regarding the difficulty of tracing minerals, the Commission limited the rule to products containing conflict minerals that are “intentionally added.” JA0741/3, JA0743/3. It also excluded conflict minerals found in tools and equipment used indirectly to produce products and “prototypes and other demonstration devices.” JA0742/3-JA0743/1.

Because the statute defines “DRC conflict free” to mean products that do not “contain” minerals that finance armed groups, the Commission also limited the rule to minerals “contained in” the final product. *Adopting Release*, JA0742/1-2. This limitation affected the rule’s application to catalysts. Because catalysts make up “a significant market for the minerals” (JA0739/2-3, JA0742/3 & n.238; *see also* Br. 32-33), and may be necessary to the production of a product, some commentators argued that catalysts should be included even if they are washed

away or consumed in the production process. But in light of the Commission's interpretation of the statutory reference to "contain," and practical difficulties with tracing catalysts that are washed away, such catalysts are not subject to the rule. JA0741/2.

The Commission also considered whether to include within the rule issuers who contract to have products manufactured. Section 1502 defines the persons subject to the disclosure requirement as those for whom conflict minerals are necessary to the functionality or production of a product they "manufactured." *Adopting Release*, JA0733/3. But Congress also required Conflict Minerals Reports to describe "'products manufactured *or contracted to be manufactured* that are not DRC conflict free.'" JA0736/1 (emphasis in release) (quoting the statute).

These provisions "raised some question" as to whether the rule should apply to issuers that contract to have their products manufactured. *Adopting Release*, JA0733/3. But in the Commission's view, "the inclusion of products that are 'contracted to be manufactured'" in the reporting requirement indicated that the rule should apply to such issuers. JA0736/1. The Commission explained that this reading was "more consistent" with the statute than the alternative, which would require companies to disclose products they contracted to have manufactured without requiring them to determine the origin of the conflict minerals in those

products. *Id.* Such a reading would be “internally inconsistent” and would “undermine the [statutory] purpose.” JA0736/1. It would also allow issuers to avoid disclosure by contracting out the manufacture of their products. JA0737/1.

The Commission, however, interpreted “contracting to manufacture” narrowly to require some actual influence over the manufacture of the product and excluded, among others, “pure retailer[s]” and issuers that “offer[] a generic product under its own brand name or a separate brand name.” *Adopting Release*, JA0736/2-3, JA0737/1. In their comment letters, appellants appeared to support the Commission’s approach. *E.g.*, BRT JA0273.

The Commission received mixed comments regarding whether the final rule should include a *de minimis* threshold. *Adopting Release*, JA0740/1. The State Department wrote that a *de minimis* exception “could have a significant impact” on the rule because conflict minerals are used “often in very limited quantities.” JA0445; *see also* Matheson JA0602 (*de minimis* exception would “destroy the intent of the law”); Calvert JA0581 (although a per-product *de minimis* threshold “may appear reasonable ... the volume adds up in large quantity of units”). Appellants argued that a *de minimis* exception was appropriate because Congress did not “expressly prohibit” it and the Commission had inherent authority to create one. NAM JA0396-JA0397; *see also* Chamber JA0260; BRT JA0274.

Commentators also suggested, without analysis, various alternative *de minimis* thresholds. *E.g.*, NAM JA0396; Semiconductor Equip. JA0236.

After reviewing the comments, the Commission concluded that a categorical exception based on small uses of conflict minerals would “thwart, rather than advance,” Section 1502’s purpose. *Adopting Release*, JA0721/1, JA0743/3. The Commission reasoned first that Section 1502 “does not contain a *de minimis* exception” and instead uses the “necessary to the functionality or production” threshold as an “express limiting factor.” JA0743/1. In the Commission’s view, the language and structure of Section 1502 showed that Congress understood that small amounts of conflict minerals could meet this requirement, yet decided against including a *de minimis* standard. *Id.* The Commission also noted that Congress did include an express *de minimis* threshold in an analogous reporting provision of Dodd-Frank. JA0743/1-2.

Moreover, because conflict minerals by nature “are often used in products ‘in very limited quantities’” (*Adopting Release*, JA0743/2 (quoting State JA0435)), the Commission agreed with commentators that the “purpose” of Section 1502 “would not be properly implemented if [the Commission] included a *de minimis* exception in [the] final rule.” JA0743/2.

## ii. Step two

Recognizing that it could be “quite costly,” the Commission rejected a suggested approach that would have required all affected issuers to use due diligence to determine whether their conflict minerals originated in the Covered Countries. *Adopting Release*, JA0759/1-2. Instead, the final rule adopts the less burdensome reasonable country of origin inquiry. JA0758/3. This standard permits issuers to “fully comply with the rule without conducting due diligence, obtaining an audit, or preparing and filing” a Conflict Minerals Report so long as, after reasonable inquiry, they have “no reason to believe that [their] necessary conflict minerals may have originated in the Covered Countries.” JA0789/1.

Many commentators, including one of the appellants, supported this approach. *See, e.g.*, NAM JA0683. But they raised concerns regarding the contours of the reasonable inquiry. *See, e.g.*, NAM JA0386-JA0387; BRT JA0274-JA0275. In response, the Commission stated that the inquiry could “differ among issuers” and that reasonableness would “depend on the available infrastructure at a given time.” *Adopting Release*, JA0756/3. The Commission also clarified that issuers can comply by “seek[ing] and obtain[ing] reasonably reliable representations” from suppliers (JA0757/1) and explained that findings

need not be made to a “certainty” (JA0759/2). *Compare* NAM JA0386-JA0389 (requesting these features).

The Commission also altered the treatment of issuers who, after reasonable inquiry, do not know whether their minerals originated in the Covered Countries. Under the proposal, all such issuers were always required to exercise due diligence. The Commission rejected this proposal, recognizing that it would require issuers to “prove a negative” to avoid due diligence and would be more costly. *Adopting Release*, JA0759/1. But the Commission also determined that reading the statute to require due diligence and a Conflict Minerals Report only when issuers know with certainty that their conflict minerals originated in the Covered Countries would give issuers an “incentive ... to avoid learning the ultimate source of the minerals,” thereby “undermin[ing] the goals of the statute.” *Id.* Thus, the final rule requires issuers to perform due diligence if they encounter a “reason to believe” their minerals may have originated in the Covered Countries. JA0758/2 & n.452.

The Commission also changed the requirements for conflict minerals from recycled or scrap sources. *Adopting Release*, JA0774/3. It agreed with commentators that “[n]o further revenue or benefit will be provided to the armed groups” from the use of these materials.” JA0777/1. Thus, an issuer must exercise

due diligence only if it “has reason to believe, as a result of its reasonable country of origin inquiry, that its conflict minerals may *not* have been from recycled or scrap sources,” and must prepare a Conflict Minerals Report only if it is *not* able to determine, as a result of its due diligence, “that the conflict minerals came from recycled or scrap sources.” JA0777/1.

### iii. Step three

Issuers who know or have reason to believe that their necessary conflict minerals may have originated in the Covered Countries and did not come from recycled or scrap sources must perform due diligence on the source and chain of custody of their conflict minerals. If, after due diligence, issuers determine that their conflict minerals did not originate in the Covered Countries, or came from recycled or scrap sources, no Conflict Minerals Report is required. *Adopting Release*, JA0758/1. Otherwise, issuers are required to submit a Conflict Minerals Report (*id.*), the contents of which are dictated by Section 1502 (Section 13(p)(1)(A)(ii)).

Because issuers who cannot determine the origin of their conflict minerals after conducting due diligence cannot know that their product is “DRC conflict free,” the proposed rules would have required such issuers to provide an audited Conflict Minerals Report and describe their product as “not DRC conflict free.”

*Adopting Release*, JA0762/2-3. Many commentators supported this approach. JA0763/1-2. Others were concerned that this disclosure would be misleading for issuers unable to determine the origin of their conflict minerals. JA0753-JA0754, JA0766/3.

In response, the Commission modified the final rule in two ways. *Adopting Release*, JA0766/2. First, during a temporary transition period, issuers that cannot determine whether their conflict minerals are DRC conflict free may file an unaudited Conflict Minerals Report describing their products as “DRC conflict undeterminable.” This transition period lasts for the first two reporting cycles (2013 and 2014) for all issuers, and the first four reporting cycles (2013 through 2016) for smaller reporting companies. JA0754-JA0755, JA0766/3-JA0767/1.

“Based on the comments,” the Commission concluded that the two-year transition period available to all issuers would “allow viable tracking systems to be put in place” and “avoid a *de-facto* embargo on conflict minerals from the Covered Countries.” *Adopting Release*, JA0767/3.<sup>2</sup> The Commission extended the period

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<sup>2</sup> The Commission received conflicting comments regarding whether Section 1502 would result, or had resulted, in a *de facto* embargo on conflict minerals from the Covered Countries. *Adopting Release*, JA0723, JA0780 & nn.719-20, JA0795 n.821. Many, including Members of Congress, the UN Group of Experts for the DRC, and civil society and human rights groups in the region, stated that Section 1502 was yielding positive results on the ground. Boxer JA0675; Leahy JA0678; UN Group of Experts JA0592; North Kivu Civil Society Groups JA0483; Enough



to four years for smaller companies in view of their lesser leverage over suppliers (JA0767/1) and noted that larger issuers using the same supplier base as smaller issuers may “have more leverage to request such information” (*id.* n.570).

Second, although issuers cannot describe their products as “DRC conflict undeterminable” after the expiration of this temporary period, the final rule also changed the language of the required disclosure from “not DRC conflict free” to “[have] not been found to be ‘DRC conflict free.’” *Adopting Release*, JA0767/1. Issuers can also add disclosure or clarification. *Id.*; *see also* n.562.

The Commission concluded that this approach satisfied the First Amendment by requiring an accurate factual disclosure in light of the statutory definition of “DRC conflict free.” *Adopting Release*, JA0768/2. Moreover, this revised language, the ability of issuers to provide additional explanation, and the temporary “undeterminable” period ensured that “the rule is appropriately tailored to lessen the impact on First Amendment interests while still accomplishing Congress’s objective.” *Id.*

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JA0688; ICAR JA0493; *see also* Matheson JA0602 (minerals “continue to be sourced in substantial volumes from the DRC”); ICAR JA0493 (“major international companies [had] unveil[ed] plans to invest in and source from mines in areas of Congo covered by the law”); Global Witness JA0512. Of those that argued a *de facto* embargo would result (*see* Br.15-16), many asserted that the problem could be mitigated by providing a phase-in period and/or interpreting the statute to apply only to newly mined minerals (as the Commission did). CEI JA0488; IPC JA0333; Pact JA0514; Verizon JA0454.

**b. The Commission considered the economic effects of the rule, including its effects on efficiency, competition, and capital formation.**

The Commission performed an in-depth economic analysis. *Adopting Release*, JA0779/2. First, the Commission detailed its understanding of the benefits Congress envisioned from the required disclosures in “furthering the humanitarian goals of reducing violence and advancing peace and security in the DRC.” JA0781/2. By requiring issuers to “understand and report on their use and source of conflict minerals from the Covered Countries,” Congress sought to reduce the amount of money provided to armed groups, “thereby achieving [its] objective[s].” JA0780/2.

While the Commission received a number of comments debating whether disclosure would actually yield these benefits (*see supra* note 2; *Adopting Release*, JA0780, JA0795), it did not quantify the benefits. Because the humanitarian benefits Congress envisioned “are derived directly from the statute” (JA0781/2), the Commission instead “designed a final rule to help achieve [those] benefits in the way that Congress directed” (*id.*). Moreover, unlike the “measurable, direct economic benefits” to investors or issuers that Commission rules ordinarily strive to achieve, Section 1502’s “social benefits” could not “be readily quantified with any precision.” JA0780, JA0795. In addition, the Commission did not have the

data to quantify the benefits or to assess how effective Section 1502 will be in achieving those benefits. JA0780, JA0795.

The Commission also considered the rule's "impact on the economy, burden on competition, and promotion of efficiency, competition, and capital formation." *Adopting Release*, JA0780/1. The Commission noted that the rule may improve informational efficiency by requiring disclosure of information material to investors' understanding of the risks of investing. JA0795/3. The rule could also, however, result in a loss of allocative efficiency because shareholders will bear the cost of compliance. *Id.*

With respect to competition, the Commission concluded that it did "not expect any effects of the rule on ... competition in the United States securities markets" (*Adopting Release*, JA0795 n.822), but that the cost of compliance may put issuers subject to the rule at a competitive disadvantage with respect to companies not covered (JA0795/2). Given Section 1502's mandatory nature, the Commission concluded that "Congress determined that its costs were necessary and appropriate" in furthering its goals. JA0795/3. Thus, the potential burden on competition was necessary and appropriate in furtherance of the purposes of Section 13(p) of the Exchange Act. *Id.* The Commission concluded that there would be no effect on capital formation. JA0796/1.

The Commission also provided a detailed quantitative analysis of the costs of the final rule. *Adopting Release*, JA0795-JA0799. It estimated the aggregate initial cost of compliance for the 5,994 issuers estimated to be affected by the rule to be between approximately \$3 billion and \$4 billion, and the annual ongoing cost of compliance to be between \$207 million and \$609 million. JA0782, JA0796/2.

The Commission also attempted to quantify the impact of its discretionary choices where possible. *Adopting Release*, JA0790 n.801, JA0793 n.811. But because “reliable, empirical evidence regarding the effects [was] not readily available to the Commission, and commentators did not provide sufficient information,” it was unable to quantify the impact of many of those choices. JA0787/3. The Commission nonetheless provided an extensive qualitative assessment of the relative costs and benefits of a number of significant discretionary choices to issuers and users of the disclosures. JA0743, JA0787-JA0795.

### **C. Proceedings Below**

Appellants challenged the rule as arbitrary and capricious under the APA and violative of the First Amendment. JA0856-JA0857. “Finding no problems with the SEC’s rulemaking and disagreeing that the ‘conflict minerals’ disclosure

scheme transgresses the First Amendment,” the district court upheld the rule and the statute. JA0857.

The court first rejected appellants’ contention that the Commission was required to “reevaluate and independently confirm” that the rule would “decrease the conflict and violence in the DRC.” JA0873, JA0879. Recognizing that Section 1502 reflected *Congress’s* determination that due diligence and disclosure would “help to promote peace and security in the DRC” (JA0877), the court concluded that the Commission “appropriately deferred” to Congress’s judgment (JA0879). The court also concluded that neither Sections 3(f), 15 U.S.C. 78(c)(f), and 23(a)(2), 15 U.S.C. 78w(a)(2), of the Exchange Act, nor this Court’s precedents construing these provisions, mandated the “broader, wide-ranging benefit analysis” appellants advocated. JA0874. This was “particularly true” because the benefits at issue “relate[d] to *humanitarian* objectives” rather than *economic* objectives. *Id.* The district court also upheld as reasonable the Commission’s consideration of efficiency, competition, and capital formation, and its determination that the rule imposed no burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act. JA0878-JA0879.

The court next disagreed with appellants’ contention that the Commission should have included a categorical *de minimis* exception (JA0882), rejecting

appellants' arguments that the Commission believed the statute foreclosed any *de minimis* threshold (JA0888) and that the decision not to include a *de minimis* exception was irrational (JA0889). And because the Commission reasonably concluded "that any type of categorical *de minimis* exception had the potential to swallow the rule," the Commission was not required to "analyze each and every" suggested threshold. JA0891.

The court also rejected appellants' challenge to the rule's trigger for due diligence. JA0893. Because Section 1502 is silent both with respect to how issuers determine whether their minerals "did originate" in the Covered Countries and as to the disclosure obligations of issuers who do not know the origin of their minerals, the rule's requirement that issuers conduct due diligence when they encounter a reason to believe their necessary minerals may have originated in the Covered Countries was reasonable and not contrary to the statute. *Id.*

Appellants' argument that Rule 13p-1 improperly included issuers that contract to have products manufactured fared no better. JA0897. The court rejected both appellants' contention that Section 1502 "plainly" excluded such issuers (JA0897-JA0898) and their argument "that the Commission wrongly believed its interpretation compelled by Congress" (JA0900). And the court found the Commission's judgment reasonable. JA0901. The court also rejected

appellants' contention that it was arbitrary and capricious for the Commission to provide a longer transition period for smaller issuers than for larger issuers.

JA0902.

Finally, the court rejected appellants' First Amendment challenge to the statute and the rule. Given "the commercial nature of the disclosures," the court applied intermediate scrutiny. JA0910. That standard was met because Section 1502 directly and materially advances the concededly substantial governmental interest of promoting peace and security in the DRC. JA0914-JA0915. Moreover, the court explained that Rule 13p-1 is a "reasonable and proportionate" means to accomplish Congress's objective. JA0917-JA0918.

#### **STANDARD OF REVIEW**

Under *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984), this Court reviews an agency's interpretation of a statute that it implements by first examining the statute de novo. If the intent of Congress is clear, the Court's task is at an end. *Id.* at 842-43. If the statute is ambiguous, the Court must defer to the agency's interpretation unless it is "manifestly contrary to the statute." *Id.* at 844.

To survive arbitrary and capricious review under the APA, regulations must be "the product of reasoned decisionmaking." *Ass'n of Private Sector Colleges*

*and Universities v. Duncan*, 681 F.3d 427, 441 (D.C. Cir. 2012). The Court’s review is “‘fundamentally deferential.’” *Id.* (citation omitted).

This Court reviews constitutional challenges to a statute *de novo*. *American Bus Ass’n v. Rogoff*, 649 F.3d 734, 737 (D.C. Cir. 2011).

### SUMMARY OF ARGUMENT

Appellants’ disagreement with Congress’s determination that Section 1502 will ameliorate the humanitarian crisis in the DRC animates their challenges to Rule 13p-1. But such a disagreement does not provide a basis for the Commission to undermine the scheme Congress envisioned. And the Commission reasonably determined that appellants’ preferred regulatory approaches would do just that.

Far from thinking itself precluded from adopting the *de minimis* exception appellants advocated, the Commission requested comment on such an exception and analyzed whether it would be appropriate in light of Section 1502’s purposes. After examining the language and structure of the statute, as well as evidence before it, the Commission reasonably concluded that creating a categorical exception for small uses of conflict minerals would thwart, rather than advance, those purposes. Indeed, it is undisputed that conflict minerals are frequently used in small amounts. And those small individual uses can have large cumulative effects.



Similarly, the Commission reasonably concluded that Congress included products “contracted to be manufactured” in the reporting requirement to prevent manufacturers from evading that requirement. And issuers would be able to do just that if those who contract to manufacture products were not included in the rule. Recognizing that the statute is silent as to how issuers determine whether their necessary conflict minerals originated in the Covered Countries, the Commission reasonably interpreted Section 1502 to require issuers to conduct due diligence when they encounter red flags in their reasonable country of origin inquiry. Without such a requirement, issuers would have an incentive to avoid learning the source of their minerals, thus undermining one of the fundamental requirements of Section 1502.

And the Commission’s provision of a longer transition period for smaller issuers than for larger issuers was far from arbitrary. That larger issuers will have greater leverage over their suppliers, and should therefore be better equipped to determine whether their products are DRC conflict free more quickly, is both intuitive and supported by comment. And because some smaller suppliers in larger issuers’ supply chains may not even be covered by the rule, and those that are will still be required to trace their minerals, there is no reason this accommodation for smaller issuers imposes an unreasonable burden on others.

In conducting its economic analysis, the Commission reasonably chose not to re-evaluate Congress's determination of benefits. Rather, the Commission designed Rule 13p-1 "to help achieve the intended humanitarian benefits in the way that Congress directed" (*Adopting Release*, JA0781/2), measuring the effects of its choices on issuers and users of the required disclosures. Nor was a re-evaluation of benefits in the DRC required for the Commission to reasonably conclude that the rule does not impose burdens on competition not necessary or appropriate in the furtherance of the Exchange Act. The Commission took numerous steps to lessen the burdens imposed by the rule. And where it did not do so, it reasonably concluded that the suggested alternatives would undermine the scheme Congress envisioned. In this circumstance, no more was required.

The Commission also provided an extensive qualitative analysis of the costs and benefits of its discretionary choices and a thorough quantitative analysis of the costs of the final rule. In the context of a mandatory rule where quantitative data was not available, this analysis was sufficient.

Finally, Section 1502 and Rule 13p-1 do not violate the First Amendment because they compel disclosure of factual information.

## ARGUMENT

### **I. The Commission Implemented Section 1502 Reasonably.**

Appellants challenge several of the Commission's regulatory decisions, arguing that they were erroneous and that they arbitrarily increased the costs of the rule without a showing of benefits in the DRC. As discussed below, however, the Commission appropriately accepted Congress's determination that Section 1502 would result in benefits in the DRC and instead balanced the costs of its choices against the degree to which they furthered the disclosure Congress intended. Moreover, the Commission's decisions were reasonable in light of the language and purpose of the statute, as well as the record evidence.

#### **A. The Commission reasonably determined not to adopt a categorical *de minimis* exception.**

The Commission's conclusion that a categorical *de minimis* exception would "thwart, rather than advance," the purposes of the statute (*Adopting Release*, JA0743/3) was reasonable. And appellants' contrary arguments misconstrue both the adopting release and the administrative record.

*First*, appellants argue that the Commission misinterpreted Section 1502 as "precluding" a *de minimis* exception. Br.27. But nowhere in the release does the Commission say that. Rather, after requesting and "considering the comments,"

the Commission determined not to exercise its exemptive authority by including a categorical *de minimis* exception. *Adopting Release*, JA0740/3, JA0743/1.<sup>3</sup>

Appellants are correct (Br.27) that, as a part of its consideration, the Commission noted that the statute itself does not contain a *de minimis* exception despite the presence of one in an analogous section of Dodd-Frank. *Adopting Release*, JA0743/1. The Commission also observed that Section 1502 has a separate limiting factor focusing on necessity, not amount. *Id.* Because it believed that Congress understood that small amounts of conflict minerals could be necessary, the Commission reasonably concluded that the language and structure of the statute indicates that Congress did not intend to include a *de minimis* exception.

But appellants ignore the remainder of the Commission's discussion. "*In addition,*" based on comments, the Commission "believe[d] that the purpose of the [statute] would not be properly implemented if [it] included a *de minimis* exception." *Adopting Release*, JA0743/2 (emphasis added). Commentators explained that including such an exception could have a significant impact on the rule because conflict minerals are often used in products in very limited quantities.

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<sup>3</sup> The Commission's brief below belies appellants' contention (Br.27, 29) that the Commission opposed this assertion for the first time at oral argument. *See* JA0820.

*Id.*; see also JA0740/1. The Commission recognized that declining to include the exception meant that trace amounts of minerals could trigger disclosure obligations, but nonetheless believed that this result best comported with its understanding of the way minerals are used. JA0743/2. This analysis would have been unnecessary had the Commission thought itself precluded from adopting a *de minimis* exception.

The Commission's analysis is also consistent with an exercise of the general exemptive and inherent *de minimis* authority on which appellants rely (Br.28). To utilize its general exemptive authority, the Commission must find the exemption "necessary or appropriate in the public interest," and "consistent with the protection of investors."<sup>4</sup> Exchange Act Section 36(a)(1), 15 U.S.C. 78mm(a)(1). Similarly, an agency's inherent authority to create *de minimis* exemptions "must be interpreted with a view to implementing the legislative design." *Ohio v. EPA*, 997 F.2d 1520, 1534 (D.C. Cir. 1993) (per curiam) (internal quotation marks omitted).

Indeed, inherent *de minimis* authority is unavailable where the application of a rule "does provide benefits, in the sense of furthering the regulatory objectives, but the agency concludes that the acknowledged benefits are exceeded by the

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<sup>4</sup> The discussion of potential exemptions elsewhere in the release also makes clear the Commission recognized its ability to use this authority. *Adopting Release*, JA0732-JA0733.

costs.” *Sierra Club v. EPA*, 705 F.3d 458, 469 (D.C. Cir. 2013) (citation omitted); *accord Shays v. FEC*, 414 F.3d 76, 114 (D.C. Cir. 2005); *Public Citizen v. FTC*, 869 F.2d 1541, 1557 (D.C. Cir. 1989). Thus, the Commission’s discussion of the statute was appropriate. And far from being “irrelevant” (Br.28), that small quantities of conflict minerals can be “necessary to the functionality or production of a product” is an important factor in deciding whether to include a *de minimis* exception.

Finally, despite characterizing the adopting release as “replete” with assertions that the Commission could not create a *de minimis* exception (Br.29-30), the only language appellants highlight—“we are of the view that Congress intended not to provide for a *de minimis* exception”—is, as the district court found, a “far cry from the type of definitive, declarative agency statements that [this Court] has described as a conclusion that the agency treated a statute as unambiguous.” JA0886-JA0887 (citing cases).<sup>5</sup>

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<sup>5</sup> Appellants also cite statements in the Commission’s brief below to argue that it believed it lacked authority. Br.29-30 (citing JA0822, JA0824). But the first is a quotation from this Court regarding inherent *de minimis* authority. *See Public Citizen*, 869 F.2d at 1557. And the second explains why the Commission did not individually discuss each suggested threshold—the Commission’s broader conclusion made it unnecessary. In any event, the Commission’s release demonstrates that it recognized it had exemptive authority.

*Second*, appellants erroneously argue that even if the Commission recognized its authority to create a *de minimis* exception, its decision not to exercise that authority was arbitrary and capricious. Br.30-35. Appellants challenge the Commission’s conclusion that such an exception could have a “significant impact” on the rule. But this conclusion was supported by numerous comments. *See, e.g.*, Matheson JA0602 (a computer chip contains “perhaps a few milligrams of tantalum,” but the semiconductor industry “as a whole consumes over 100 tons of tantalum metal annually”); Durbin JA0103 (the weight of conflict minerals essential to “many products” is “very small” as is “the percentage by weight or dollar value of the conflict minerals as a proportion of unit cost”); Calvert JA0581.

Appellants argue that these comments, as well as that of the State Department, are conclusory. Br.34. But the comments suggesting *de minimis* thresholds were no more detailed. And faced with comments credibly relying on the undisputed fact that these minerals are regularly used in small amounts, with no more granular information from which to make an informed judgment as to what level of use was truly “*de minimis*,” the Commission reasonably chose not to create

a categorical exception.<sup>6</sup> *See Ctr. for Auto Safety v. FHWA*, 956 F.2d 309, 316 (D.C. Cir. 1992) (Thomas, Circuit Justice) (“an agency has some leeway reasonably to resolve uncertainty ... in favor of more regulation or less”); Cass R. Sunstein, *Cost-Benefit Default Principles*, 99 MICH. L. REV. 1651, 1695 (2001).

Appellants also argue that, had the Commission individually analyzed various thresholds suggested by commentators, it “easily” could have picked some alternative that would have alleviated its concerns. Br.31. But the Commission’s broader conclusion rendered such examination unnecessary. The suggestions focused on the amount of conflict minerals contained in a single issuer’s products, or their cost relative to total production cost for the issuer, without examining their cumulative impact across industries. *See, e.g., Semiconductor Equip.* JA0236; NAM JA0396-97; Br.32. And even if the cumulative amount would be small in numerical terms, it is not clear that this translates to a *de minimis* regulatory effect. Indeed, appellants’ and amici’s repeated assertions that “many companies” (Br.32),

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<sup>6</sup> Appellants are incorrect that Commission counsel’s statement before the district court that individualized exceptions are not foreclosed is inconsistent with this conclusion. Br.29. The Commission’s express exemptive authority gives it authority to proceed on a case-by-case, as well as categorical, basis. *See Exchange Act Section 36(a)(1)*, 15 U.S.C. 78mm(a)(1). And nothing in the Commission’s decision not to adopt a categorical exception precludes it from assessing whether the use of conflict minerals in particularized situations may have a truly *de minimis* effect on the regulatory scheme.



or entire industries (Indus. Br. 17), would be affected by a *de minimis* exception indicates otherwise.

Thus, the suggested thresholds did not “undermine[]” (Br.34) the Commission’s rationale. Rather, that rationale applies equally to each suggestion and, given the Commission’s broader conclusion, the Commission was not required to address them individually. *Chamber of Commerce v. SEC*, 412 F.3d 133, 143 (D.C. Cir. 2005); JA0891-JA0892.<sup>7</sup>

Finally, appellants’ arguments regarding catalysts are misguided. Although catalysts can be “necessary to the production” of products and are therefore included within the statutory mandate, in light of the statutory language as well as concerns that tracing catalysts that are consumed in production would be difficult, the Commission included within the rule only those catalysts “contained” in the end product. *Adopting Release*, JA0739/3, JA0742/3.

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<sup>7</sup> Appellants’ reliance (Br.28) on *American Petroleum Institute v. SEC*, 2013 WL 3307114 (D.D.C. July 2, 2013) (“*API*”), is also misplaced. In *API*, the court concluded that in refusing to provide an exemption, the Commission “impermissibly rested on the blanket proposition that avoiding *all* exemptions *best furthers*” the relevant statute’s purpose. *Id.* at \*14 (emphasis added). Here, although the Commission adopted other alternatives to reduce costs, it determined that this particular exception would “thwart, rather than advance,” Section 1502’s purpose. *Adopting Release*, JA0743/1-2.

Appellants argue that it was arbitrary or capricious not to go one step further and exclude *all* catalysts. Br.32-33; *see also* Indus. Br.12. But nothing required the Commission to do so simply because it could. *See* JA0891. And evidence before the Commission showed that catalysts make up a “significant market for the minerals.” *Adopting Release*, JA0742/3 & n.238 (internal quotation marks omitted). It was therefore reasonable for the Commission not to exclude catalysts altogether. JA0742. Indeed, that a “trace” amount of a mineral is *left* in a product does not mean that only a trace amount was *used* to make it.<sup>8</sup>

**B. The Commission’s inclusion of issuers who “contract to manufacture” products was reasonable.**

Section 1502’s definition of a “person described,” which delineates those covered by the statute, does not include the phrase “contract to manufacture.” But products that are contracted to be manufactured are included in the statute’s reporting requirement. The Commission concluded that this, as well as industry

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<sup>8</sup> Industry amici’s arguments are unpersuasive. Indus. Br.5, 13, 16. The Commission considered comments regarding organic metal compounds from conflict mineral derivatives and limited the final rule’s coverage to gold and the most common conflict mineral derivatives: tin, tantalum, and tungsten. *Adopting Release*, JA0729/1-2, JA0730/2. Moreover, amici concede that Commission staff has interpreted the rule to exclude the use of packaging containing conflict minerals and provide no reason for further excluding the manufacturers of that packaging themselves (Indus. Br.18, 19 n.7). Finally, on the limited facts presented, it appears that amici’s concerns about new formulations of products (*id.* at 15-16) are addressed by the exclusion of prototypes and demonstration devices. JA0743/1.

practice, indicated that issuers that contract to manufacture products should be included in the rule when they have some actual influence over the manufacturing process. *Adopting Release*, JA0736-JA0737. Although at least one of the appellants appeared to agree with this approach (BRT JA0273), appellants now argue that Section 1502 unambiguously precludes it. Alternatively, appellants argue that the inclusion of such issuers was arbitrary and capricious. Both arguments fail.

In appellants' view, Congress's inclusion of the term "contract to manufacture" in the reporting requirement, but not in the definition of a "person described," "shows that Congress *did not* intend to cover those who only contract to manufacture products." Br.41; *see also* Retail Br.5-7. "When interpreting statutes that govern agency action," however, this Court has "consistently recognized that a congressional mandate in one section and silence in another often 'suggests not a prohibition but simply a decision *not to mandate* any solution in the second context, *i.e.*, to leave the question to agency discretion.'" *Catawba Cty., N.C. v. EPA*, 571 F.3d 20, 36 (D.C. Cir. 2009) (citations omitted).<sup>9</sup> And "‘manufacture’ is an inherently ambiguous term." *United States v. Western Elec.*

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<sup>9</sup> This disproves amici's contention (Retail Br.12) that appellants' reading is necessary to prevent the phrase "‘manufactured or contracted to be manufactured’" in the reporting requirement from being "superfluous."

*Co.*, 894 F.2d 1387, 1391 & n.5 (D.C. Cir. 1990) (citing *Charles Peckat Mfg. Co. v. Jarecki*, 196 F.2d 849, 851 (7th Cir. 1952) (patent holder who contracts with fabricator is “manufacturer”)); *see also* JA0899. Thus, the statutory language merely “raised some question” as to whether issuers who contract to have products manufactured should be included. *Adopting Release*, JA0733/3.

Moreover, the Commission reasonably explained that appellants’ purportedly plain reading of Section 1502 would be “internally inconsistent.” *Adopting Release*, JA0736/1. While the reporting requirement includes products the issuer contracts to manufacture that are not DRC conflict free, issuers must inquire into the origin of minerals that are “necessary as described” in the definition of a “person described.” Section 13(p)(1)(A)(i), (p)(2)(B), 15 U.S.C. 78m(p)(1)(A)(i), (p)(2)(B). If that definition were read to exclude products contracted to be manufactured, issuers would be required to report products they contract to have manufactured that are not DRC conflict free without being required to inquire into the origin of the minerals in those products.

Appellants also contend that, regardless of whether their statutory interpretation is compelled, the Commission’s interpretation “is entitled to no deference” because the Commission wrongly believed *its* interpretation to be compelled by Congress. Br.43. But this is incorrect. JA0900.

Appellants emphasize (Br.43-44) the Commission's statement that Congress's intent to include issuers that contract to have their products manufactured "is clear" based on issuers' statutory obligation to describe products that are contracted to be manufactured in their reports. *See Adopting Release*, JA0736. But, as this Court concluded in *Duncan*, 681 F.3d at 445, a single "use of the word 'clear'" does not demonstrate that the agency believed its regulatory interpretation was compelled by Congress; rather, the Court considers the totality of the agency's explanation. *Id.*

And the Commission's explanation here did not "'rest[] simply on its parsing of the statutory language.'" Br.44 (citing *Peter Pan Bus Lines, Inc., v. Fed. Motor Carrier Safety Admin.*, 471 F.3d 1350, 1354 (D.C. Cir. 2006)). From the time of the proposing release, the Commission recognized that the language of the statute "raised some question" as to whether issuers who contract to have their products manufactured should be included. *Adopting Release*, JA0733/3. And in addition to questioning the contrary reading of the statute, the Commission concluded that it "would significantly undermine the purpose of the statutory provision to fail to apply it to issuers that contract to manufacture their products." JA0736/1; *see also* Durbin JA0103 (if issuers "that contract the manufacture of goods ... are exempt from reporting, then a large, non-transparent use of the black

market for DRC conflict minerals would remain”); Enough JA0280 (“[C]onflict minerals are most commonly used in ... products that may be manufactured by a different entity than the one that brands, markets, and profits from the product.”). Moreover, the Commission explained that “if ‘contract to manufacture’ is not included in the definition of ‘person described,’” issuers could “evade” the statute by contracting their manufacturing to a third party. JA0737/1.<sup>10</sup>

Finally, appellants contend that the inclusion of issuers that contract to manufacture was unreasonable because it “needlessly sweeps into the rule retailers and others who manufacture nothing” without “a proper cost-benefit analysis.”

Br.44. But the Commission stated that it did not consider an issuer “in a similar position to that of a pure retailer” as contracting to manufacture a product.

*Adopting Release*, JA0737/1. Rather, cognizant of the “costly burdens” the rule would place on issuers with minimal influence over the manufacturing process, only those issuers with “some actual influence” will be considered to contract to manufacture. JA0736/2.<sup>11</sup> And while the degree of influence necessary depends

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<sup>10</sup> The conclusion that including issuers that contract to manufacture products closes a potential loophole refutes amici’s contention (Retail Br.18) that the Commission included such issuers “without identifying any concomitant benefits.”

<sup>11</sup> The legislative history petitioners (Br.41-42) and amici (Retail Br.7-8) cite is consistent with the Commission’s interpretation, which excludes pure retailers but includes issuers with a role in the manufacturing process.

on the facts and circumstances, the Commission provided extensive guidance.

JA0736/3. Most relevant here, an issuer is not contracting to manufacture a product if it does “no more than”: specify or negotiate contractual terms with a manufacturer that do not directly relate to the manufacturing of the product; affix its brand, marks, logo, or label to a generic product manufactured by a third party; or service, maintain, or repair a product manufactured by a third party.

JA0736/3.<sup>12</sup>

**C. Requiring due diligence when issuers have reason to believe their minerals may have originated in the Covered Countries is reasonable.**

Section 1502 is silent on how issuers should determine “whether” their necessary conflict minerals “did originate” in the covered countries. The Commission prescribed a two-step process to fill this gap. First, issuers perform a “reasonable country of origin” inquiry into whether their necessary conflict minerals “originated” in the Covered Countries. *Adopting Release*, JA0788/1. Then, if, and only if, that inquiry gives issuers a “reason to believe” their conflict minerals “may have originated” in the Covered Countries, issuers must exercise

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<sup>12</sup> Amici contend (Retail Br.13) that “agency guidance is little comfort.” But this Court has relied on the explanation accompanying a Commission rule to reject a challenge that the rule was unclear. *Marrie v. SEC*, 374 F.3d 1196, 1203-04 (D.C. Cir. 2004).

due diligence. JA0788/3. Appellants challenge this latter inquiry, arguing that Section 1502's language precludes it and that it is too onerous. Br.35. The district court correctly rejected both arguments. JA0892-JA0897.

Appellants first incorrectly assert that the rule “requires a company *to file a report* unless based on its reasonable country of origin inquiry, the issuer has no reason to believe that its conflict minerals may have originated in the covered countries.” Br. 35-36 (internal quotation marks omitted). But issuers are not invariably required to submit an audited Conflict Minerals Report if their reasonable country of origin inquiry provides a reason to believe their minerals may have originated in the Covered Countries. Rather, issuers must perform due diligence. If that due diligence reveals either that an issuer's minerals did not originate in the Covered Countries or were from recycled or scrap sources, no report or audit is required. *Adopting Release*, JA0758-JA0759. A report is required only if an issuer knows its minerals originated in the Covered Countries, or the issuer encountered a red flag during its reasonable country of origin inquiry and its due diligence either reveals that the minerals originated in the Covered Countries or does not reveal the source of its minerals.

This distinction is important because, contrary to appellants' suggestion (Br.37), the statute does not tie *both* the due diligence and reporting requirements



to the “did originate” language. That language triggers only the reporting requirement. Nothing in the statute speaks to when issuers must perform due diligence. Nor is there anything that describes how an issuer is to determine “whether” its minerals originated in the Covered Countries. The Commission could have required due diligence to fulfill this obligation but, cognizant of the costs of such a requirement, it did not do so. *Adopting Release*, JA0759/1-2. Instead, it required due diligence only when an issuer encounters red flags in its reasonable country of origin inquiry and therefore has a “reason to believe” that its necessary minerals “may have originated” in the Covered Countries. Nothing in this requirement contravenes the statute.

Any challenge to the requirement that issuers file a report if they encounter red flags *and* their due diligence does not reveal the source of their minerals similarly fails. Section 1502 is silent as to the reporting obligations of issuers who do not know whether their minerals originated in the Covered Countries. JA0893. The application of the reporting requirement to issuers who do know that their minerals so originated does not remove the ambiguity. *Id.* & n.19; *see also Catawba Cty.*, 571 F.3d at 36. Appellants have all but conceded this ambiguity by recognizing that the Commission had discretion to require issuers that have a “reason to believe” that their conflict minerals “did originate” in the Covered

Countries to file a report. JA0896. And the Commission reasonably determined that it would undermine Congress's aims to allow issuers to avoid reporting even if after due diligence they *still* had reason to believe that their minerals may have originated in the Covered Countries. *Adopting Release*, JA0758/3-JA0759/1.

Appellants argue that the “reason to believe *may* have originated” standard is an unreasonable interpretation of the statute because it “vastly extends” the rule vis-à-vis a “reason to believe *did* originate” standard by requiring an issuer that believes there is a “*five percent chance* that its minerals originated in the [Covered Countries]” to conduct due diligence. Br.38. But, as the district court explained, such an issuer also has a “reason to believe its minerals ‘*did* originate’ in the Covered Countries.” JA0897 & n.21. And because reporting is required only where an issuer encounters red flags during its initial inquiry and fails to dispel those red flags during the course of its due diligence, appellants’ concern that the rule will “result in an ‘avalanche of trivial information’” (Br.38) is unfounded.<sup>13</sup>

For the first time on appeal, appellants argue that the Commission’s interpretation is erroneous because an earlier version of the legislation contained “may have originated” language. Br.37. But the difference between the draft and final versions does not eliminate the ambiguity. *See Hammontree v. NLRB*, 925

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<sup>13</sup> Private plaintiffs suing over a disclosure under the rule would have to show that any misstatement was “material[.]” *Adopting Release*, JA0794 n.813; *cf.* Br.38.

F.2d 1486, 1492 (D.C. Cir. 1991) (en banc). A “plausible reading of Congress’ deletion of the proposed language” is that Congress “deemed it superfluous.” *Id.*

Appellants next assert that the Commission’s approach is arbitrary because it was unable to “point[] to *any* benefit” to justify the standard’s alleged burdens.

Br.39. But the Commission concluded that its standard would ensure that issuers do not have an incentive to avoid learning the source of their minerals, which would undermine the regulatory scheme. *Adopting Release*, JA0759/1. Appellants argue that this concern is illusory. Br.40. But without a reason-to-believe standard, issuers could conduct a good-faith inquiry and encounter red flags, yet not be required to conduct due diligence because they would not *know* whether their minerals “did originate” in the Covered Countries.

Moreover, appellants overstate the burdens of the Commission’s standard. They suggest that the rule requires issuers to conduct due diligence “simply because they are unable to determine the minerals’ source.” Br.36; *see also* Br.38, 39. But the Commission expressly rejected such a standard. “[I]ssuers who have no reason to believe that their minerals may have originated in the Covered Countries ... need not conduct any further due diligence efforts, nor must they file a Conflict Minerals Report.” JA0895; *see also Adopting Release*, JA0757/3, JA0758/2, JA0788/3. Due diligence is required only if an issuer encounters red

flags during its reasonable country of origin inquiry. *See* JA0758/2 & n.452. And the Commission made clear that such an inquiry does not require issuers to determine their minerals' origin with "certainty." JA0758/1.

**D. The Commission adopted a reasonable transition period.**

Appellants erroneously argue (Br.45-46) that the Commission acted arbitrarily in providing a longer transition period for smaller issuers than for large issuers. The Commission reasonably relied on commentators to determine that a two-year transition period would allow sufficient time for "the necessary traceability systems in the Covered Countries to be established." *Adopting Release*, JA0754/3. The Commission extended the transition period to four years for smaller issuers because acting alone "these issuers may lack the leverage to obtain detailed information regarding the source of a particular conflict mineral." JA0768/1; *see also* JA0767/3 & n.568. But it also noted, based on comments, that this lack of leverage may be reduced by the influence exerted over their suppliers by larger issuers using the same supplier base. JA0768/1 n.570. Thus, larger issuers could be better equipped to comply in two years.

Moreover, the transition period does not relieve issuers of their obligation to comply with the rule or to trace the source of their conflict minerals. It simply allows issuers whose reasonable country of origin inquiry and due diligence do not

reveal the source of their minerals to describe their products as “DRC conflict undeterminable.” *Adopting Release*, JA0754/3-JA0755/1. Thus, any smaller issuers in a larger issuer’s supply chain will still be tracing their minerals.<sup>14</sup>

Finally, there is no reason that allowing a longer transition period for small suppliers that are subject to the rule and must trace the origin of their conflict minerals increases the burden on large issuers. Some small issuers subject to the four-year transition period may not be part of large issuers’ supply chains. The four-year transition period for those smaller issuers has no effect on larger issuers. And larger issuers have some small suppliers in their supply chains that are not reporting companies subject to the rule.

## **II. The Commission Appropriately Considered the Economic Effects of the Rule.**

Appellants and amici next challenge the Commission’s economic analysis, arguing both that it was deficient because the Commission did not estimate the degree to which the rule would in fact yield the humanitarian benefits Congress intended and that the Commission insufficiently considered whether the “added costs” of its decisions were justified by an increase in those benefits. But the

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<sup>14</sup> There is therefore no inconsistency (Br.45-46) between the transition period and the Commission’s statement, in declining to exempt small businesses from the rule, that small issuers “could still be required to track and provide their conflict minerals information for larger issuers.”

Commission rationally accepted Congress's determination that the required disclosure would yield benefits on the ground in the DRC, and its analysis fully complied with both the APA and the Exchange Act. JA0877-JA0878.

**A. The Commission was not required to second-guess Congress's determination that the mandated disclosure would yield humanitarian benefits.**

Appellants and amici first argue that the Commission was required to enter the policy debate as to whether Congress's disclosure regime will yield benefits on the ground in the DRC. Br.47-49; API Br.13; Indus. Br.6; Academics Br.21-22. But Congress chose a side in this debate by enacting Section 1502. Section 1502(a); 155 Cong. Rec. S4697 (daily ed. Apr. 23, 2009) (statement of Sen. Feingold). And rather than second-guessing Congress's judgment, the Commission reasonably designed its rule "to help achieve the intended humanitarian benefits in the way that Congress directed." *Adopting Release*, JA0781/2.

Both the Supreme Court and this Court have recognized that such an analysis satisfies the requirement that agencies "examine the relevant data and articulate a satisfactory explanation." *Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto Insur. Co.*, 463 U.S. 29, 43 (1983). As *FCC v. Fox Television Stations, Inc.* explains, once Congress has determined to pursue a particular regulatory

course, requiring empirical data prior to administrative implementation of that policy would render it a nullity. 556 U.S. 502, 519 (2009); *see also Consumer Elecs. Ass’n. v. FCC*, 347 F.3d 291, 303 (D.C. Cir. 2003); *Charter Commc’ns, Inc. v. FCC*, 460 F.3d 31, 42 (D.C. Cir. 2006); *cf. Ctr. for Biological Diversity v. EPA*, 722 F.3d 401, 414 (D.C. Cir. 2013) (Kavanaugh, J., concurring).<sup>15</sup>

Indeed, the plain language of Section 1502 anticipates that *other* agencies and branches of government will assess the efficacy of Section 13(p) and Rule 13p-1 in promoting peace and security in the DRC. The Comptroller General, *not the Commission*, is required to report to *Congress* on “the effectiveness of section 13(p) ... in promoting peace and security in the [DRC] and adjoining countries.” Section 1502(d)(2)(A). The State Department is charged with developing a strategy “to address the linkages between human rights abuses ... and commercial products.” Section 1502(c)(1)(A). And the President, not the Commission, has the

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<sup>15</sup> That Congress itself has determined that disclosure will yield the social benefits it desires distinguishes this case from the dicta in *Public Citizen v. Fed. Motor Carrier Safety Admin.*, 374 F.3d 1209 (D.C. Cir. 2004), on which appellants and amici rely (Br.40, 49; Academics Br.19; Indus. Br.7).

authority to determine that the disclosures are no longer needed. Section 13(p)(4).<sup>16</sup>

Appellants and amici nonetheless argue that the Exchange Act required the Commission to independently measure the benefits of the required disclosure on the ground in the DRC. Br.47, 50; API Br.20-21; Academics Br.21-22; Indus. Br.6. They assert that otherwise the Commission cannot have determined that the rule does not impose burdens on competition that are not “necessary or appropriate” in furtherance of the Exchange Act, as required by Section 23(a)(2) of that Act. Br.47, 50; API Br.13, 15-16; Academics Br.18-22. Indeed, amicus API argues that this standard cannot have been met without a Commission determination that “the competitive burdens [the rule] imposed were *no greater than necessary to secure*” the intended benefits. API Br.16 (emphasis added).

But both the legislative history of Section 23(a)(2) and analogous case law make clear that it does not require the Commission to determine that its rules are the “least anti-competitive” means of achieving statutory goals. S. Rep. No. 94-75 at 13 (1975); *Bradford Nat’l Clearing Corp. v. SEC*, 590 F.2d 1085, 1105 (D.C. Cir. 1978). Rather, the Commission is required to “balance” competitive

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<sup>16</sup> For the same reasons, amici are wrong that an assessment of benefits was essential as “an important check on the SEC’s ability ... to perpetuate its own powers” (Academics Br.20).



considerations against other policy goals of the Exchange Act. *Bradford*, 590 F.2d at 1105; *Belenke v. SEC*, 606 F.2d 193, 200 (7th Cir. 1979); *In re Nat'l Sec. Clearing Corp.*, Exch. Act Rel. No. 34-13163, 1977 WL 173551, at \*8 (Jan. 13, 1977). And this balancing is subject to the same arbitrary and capricious review as other agency determinations. S. Rep. 94-75 at 13; *Bradford*, 590 F.2d at 1104.

Here, the Commission recognized that complying with the rule may impose competitive burdens on affected issuers relative to competitors who are not covered by the rule.<sup>17</sup> *Adopting Release*, JA0795/2-3. As discussed, the Commission took numerous steps to lessen these potential burdens, including steps suggested by commentators to mitigate the risk of a *de facto* embargo.<sup>18</sup> JA0752/2, JA0767/3. And in the few challenged areas in which the Commission rejected suggested approaches to lower costs, it did so based upon its reasonable conclusions that these approaches would *undermine* the disclosure scheme

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<sup>17</sup> Section 23(a)(2) was not intended to ensure that the Commission consider the relative competitive position of issuers. Rather, it was to ensure consideration of barriers to competition among markets and market makers in the development of a national market system for securities. S. Rep. 94-75 at 12-13. Here, the Commission found that there would be no effect on competition in the United States securities markets. *Adopting Release*, JA0795/2 n.822. It went on, however, to consider the potential competitive effects in the industries of affected issuers. *Id.*

<sup>18</sup> Thus, amici are wrong (Academics Br.22) that the Commission “ignore[d]” these comments.

Congress intended. *See, e.g.*, JA0736/1 (contract to manufacture), JA0743/2-3 (*de minimis*), JA0759/1 (due diligence requirement).<sup>19</sup> In that circumstance, no more extensive analysis was required for the Commission to reasonably conclude that “[t]o the extent the final rule ... imposes a burden on competition in the industries of affected issuers,” that burden “is necessary and appropriate in furtherance of the purposes of Section 13(p).” JA0795/3; *see Bradford*, 590 F.2d at 1105.

**B. The Commission’s analysis of the incremental impact of its choices complied with the Exchange Act.**

Appellants and amici next argue that without measuring benefits on the ground in the DRC, the Commission cannot have sufficiently considered whether the marginal costs of its choices appropriately furthered the regulatory purpose pursuant to Exchange Act Section 3(f). Br.50, 51; API Br.25-26. But as already discussed, the Commission acted reasonably in accepting Congress’s decision that Section 1502’s disclosure scheme would lead to social benefits in the DRC. Thus, its extensive analysis of the costs and benefits of its choices *to issuers and users of the disclosures* in comparison to suggested alternatives was sufficient. *Adopting Release*, JA0787-JA0795. And contrary to amici’s arguments (Indus. Br.3, 8-9), a

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<sup>19</sup> Contrary to appellants’ assertion that the Commission “recognized” that all of the challenged choices increased burdens on competition (Br. 47), the transition period was created to *lessen* the burdens on issuers. *Adopting Release*, JA0766/3. And it reasonably does so.

qualitative, rather than quantitative, analysis of these choices was appropriate in light of the intangible nature of many of the benefits (*see, e.g.*, JA0788/1, JA0790/1, JA0791/1-2, JA0793/2-3), commentators' failure to provide the necessary data (JA0787/3, JA0792/2 n.805), and the lack of "readily available" data for the Commission to perform its own studies (JA0787/3).

Similarly, the Commission was not required to analyze "the market for conflict minerals mined by the armed groups in the Congo" (Indus. Br.6) to assess the incremental impact on the ground in the DRC of decisions such as whether to include a *de minimis* exception or issuers who contract to have products manufactured. *Id.* at 6-7; *see also* API Br. 27-28; Retail Br.18-19. Again, the Commission reasonably determined that excluding small uses or issuers who contract to have products manufactured would undermine the disclosure scheme Congress mandated. In that context, and because sufficient quantitative data was not available, the Commission's qualitative discussion of the impact of these decisions (*Adopting Release*, JA0743, JA0790/3-JA0791/1) was sufficient.<sup>20</sup>

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<sup>20</sup> Appellants argue that the Commission was capable of predicting "how the rule would affect the economic decision-making of American businesses." Br.50 n.4. Similarly, API suggests that this rule would have both economic and humanitarian effects. API Br.23. But is unclear that a prediction of issuers' economic reactions to the rule (which would be inherently speculative) would adequately measure whether the rule promotes peace and security in the DRC. Nor did the Commission have sufficient data to make such a prediction. *Adopting Release*,

**C. Contrary to API's contention, the Exchange Act did not require a more detailed economic analysis.**

Amicus API separately argues the Exchange Act required a more detailed economic analysis. API Br.12-15; *see also* Br.50, 51. But as the district court concluded (JA0873-JA0874), nothing in the Commission's obligation under Section 3(f) of that Act to "consider" the effects of its rules on efficiency, competition, and capital formation invariably requires the type of formal quantitative cost benefit analysis API alludes to.<sup>21</sup> API Br.9, 12. As this Court recently stated in concluding that a statutory requirement for an agency to "consider" and "evaluate" economic effects did not require a "rigorous, quantitative economic analysis," "[w]here Congress has required [such an analysis] it has made that requirement clear in the agency's statute." *Invest. Co. Inst. v. CFTC*, 720 F.3d 370, 379 (D.C. Cir. 2013); *see also* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-12-151, DODD-FRANK ACT REGULATIONS 9-12 (2011) (Exchange

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JA0780/3. It was therefore entirely reasonable for the Commission to defer to the prediction Congress already made regarding that response.

<sup>21</sup> To the extent API is asserting that the Commission violated Executive Orders 13,563 and 12,866, it is worth noting that as an independent regulatory agency it is not bound by those Executive Orders. And while the Commission considers potential costs and benefits as a matter of good regulatory practice it does not do so in the manner prescribed in those orders. Moreover, an agency's failure to comply with the orders is not subject to judicial review. *Helicopter Ass'n Int'l, Inc. v. FAA*, 722 F.3d 430, 439 (D.C. Cir. 2013).

Act does not prescribe a methodology for a formal assessment of the costs and benefits of rules).

Moreover, while the Commission did not re-evaluate Congress's judgment that disclosure would promote peace and security in the DRC, where it reasonably felt it could, it took into account comments that the benefits may be less than Congress anticipated. *Adopting Release*, JA0752/2, JA0767/3. And it considered the benefits of the final rule to issuers and users of the information disclosed (*see, e.g.*, JA0781/2, JA0787/3, JA0791/1, JA0791/3-JA0792/1, JA0793/2-3), thereby assessing whether the rule promoted the disclosure Congress intended.

Contrary to API's contention (API Br.13-14), nothing in this Court's precedents interpreting the Commission's obligation to perform economic analysis required a more wide-ranging analysis. *See also* Indus. Br.7. Those cases require the Commission to "do the best it can" to determine the economic implications of its rules. *Chamber*, 412 F.3d at 143. But none of them involved mandatory rulemaking. JA0876-JA0877. Rather, they faulted the Commission for failing to justify the impact of rules it chose to adopt. *Business Roundtable v. SEC*, 647 F.3d 1144, 1150 (D.C. Cir. 2011); *see also Am. Equity Inv. Life Ins. Co. v. SEC*, 613 F.3d 166, 178 (D.C. Cir. 2010); *Chamber*, 412 F.3d at 143-44. Thus they do not

address the reasonableness of a decision to defer to a congressional determination of benefits. Here, that decision was entirely reasonable.

This is especially true in light of the humanitarian, rather than economic, nature of the congressionally intended benefits. Appellants and amici criticize the district court for relying on this distinction (Br.50 n.4; API Br.21-24), but it is well established that social benefits are difficult to measure and therefore a less exacting analysis is required. *Fox*, 556 U.S. at 519; *ConocoPhillips Co. v. EPA*, 612 F.3d 822, 841 (5th Cir. 2010). And, as the Commission found, the Commission would have been “unable” to “readily quantify” those benefits here “with any precision.” *Adopting Release*, JA0780/3, JA0787/3, JA0795/2.

And while API is correct that Sections 3(f) and 23(a)(2) apply regardless of whether a rule’s intended benefits are economic or social (API Br.22), that merely begs the question of whether those provisions required the Commission to attempt to measure Congress’s intended benefits. As explained, given Congress’s determination, the difficulty of quantifying humanitarian benefits, and the dearth of quantitative evidence in the record (*Adopting Release*, JA0780/3, JA0787/3, JA0795/2), the Commission reasonably chose not to.

But this is not an assertion that the Commission did not have to weigh the economic effects of its rule at all (API Br.13-14, 18-19). Rather, it is merely a

recognition that, as the district court found, the Commission's obligations under the Exchange Act are more flexible than appellants contended below (and API contends on appeal). *See Invest. Co. Inst.*, 720 F.3d at 378; *Business Roundtable*, 647 F.3d at 1148 (reviewing Commission economic analysis under the *State Farm* rationality standard).

Nor did the Commission fail to “actively weigh” its choices here. API Br.14. It merely evaluated the economic effects of those choices against a different benchmark—the effect on issuers and users of the information. And the Commission did not pursue Congress's intended benefits at all costs (Br.50, n.4; API Br.25). Indeed, it did the opposite—explicitly striving “to reduce the burden of compliance” where possible while “remaining faithful to the language and intent” of the statutory mandate. *Adopting Release*, JA0724/1-2; *see supra* 10-19.

Finally, API contends (API Br.16-18) that this Court's decision in *NetCoalition v. SEC*, 615 F.3d 525 (D.C. Cir. 2010), required a more detailed analysis of the competitive effects of the rule under Section 23(a)(2). But *NetCoalition* did not involve rulemaking subject to Section 23(a)(2). Rather, at issue was the Commission's approval of an application by a securities exchange to charge a fee for access to proprietary trade data. The reasonableness of the Commission's decision to do so turned entirely on the presence of a competitive

market to constrain prices. *Id.* at 532, 539. It was for that reason that the Court required a more detailed examination of the extent of competition. *Id.* at 541-43.

Here, in contrast, the presence of a competitive market is not at issue. The potential for the rule to burden the competitiveness of affected issuers arises from compliance costs (*Adopting Release*, JA0795/2), the Commission's extensive analysis of which is not challenged.<sup>22</sup> And while API asserts that the Commission should have "assessed the magnitude" of this competitive burden, as discussed, the Commission reasonably concluded that commentators' purportedly less costly alternatives would undermine Congress's purpose. Nothing in *NetCoalition* required a more detailed analysis in this circumstance. *Cf. Invest. Co. Inst.*, 720 F.3d at 378.

### **III. Section 1502 and Rule 13p-1 do not violate the First Amendment.**

Appellants argue that Section 1502 and Rule 13p-1 violate the First Amendment. They are mistaken.

#### **A. Rational basis review, not strict scrutiny, applies.**

While disclosure requirements "may burden the ability to speak, ... they ... do not prevent anyone from speaking." *Citizens United v. FEC*, 130 S.Ct. 876, 914

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<sup>22</sup> Appellants challenged two aspects of the Commission's quantitative analysis below. But the district court rejected those challenges (JA0880-JA0882) and appellants have not raised them on appeal.



(2010). The Supreme Court, therefore, “has explained that disclosure is a less restrictive alternative to more comprehensive regulations of speech.” *Id.* at 915.

Here, Rule 13p-1 requires the “disclosure of economically significant information designed to forward ordinary regulatory purposes.” *Pharm. Care Mgmt. Ass’n v. Rowe*, 429 F.3d 294, 316 (1st Cir. 2005). And courts have found it “neither wise nor constitutionally required” to subject the “[i]nnumerable federal and state regulatory programs [that] require the disclosure of product and other commercial information” to “searching” First Amendment scrutiny. *Nat’l Elec. Mfrs. Ass’n v. Sorrell*, 272 F.3d 104, 116 (2d Cir. 2001); *see also Rowe*, 429 F.3d at 316. Thus, rational basis review applies. *Env’tl. Def. Ctr. v. EPA*, 344 F.3d 832, 849-51 & n.27 (9th Cir. 2003). And because requiring issuers to disclose the products that have not been found to be DRC conflict free is reasonably related to Congress’s goal of promoting peace and security in the DRC, Rule 13p-1 survives review.

Appellants nonetheless argue that strict scrutiny applies. Br.52-53. But the Supreme Court has applied heightened scrutiny to regulations requiring disclosures only in limited circumstances, none of which is present here. *Rumsfeld v. Forum for Academic and Instit’l Rights, Inc.*, 547 U.S. 47, 61 (2006) (“FAIR”).

Appellants assert that the required disclosure “embodies a particular ideological

view.” Br.53. But there is nothing ideological about a factual statement that certain products *have not been found to be* DRC conflict free. *Adopting Release*, JA0767/1-2. Issuers will conduct a reasonable country of origin inquiry and due diligence and will determine either that their products meet the statutory definition of DRC conflict free or do not. Requiring issuers to disclose the results of this inquiry is “simply not the same as forcing a student to pledge allegiance, or forcing a Jehovah’s Witness to display the motto ‘Live Free or Die.’” *FAIR*, 547 U.S. at 62 (internal citations omitted). For the same reason, the required disclosure will not be “frequently ... false or misleading” as appellants contend (Br.53). Rather, it will be factually accurate.

And the Supreme Court has rejected appellants’ argument (Br.52-53) that the potential for “stigma” requires heightened scrutiny.<sup>23</sup> *See Meese v. Keene*, 481 U.S. 465, 478-82 (1987). As the Court explained, the appropriate response to such a risk of reputational harm is not to invalidate the disclosure, but to allow explanatory information to dispel any potential mistake. *Id.* at 481. Rule 13p-1 does just that. *See Adopting Release*, JA0767/1-2 & n.562.

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<sup>23</sup> Appellants contend that the required disclosure will leave consumers “with the misleading and harmful impression that the company is complicit in human rights abuses.” Br.57. But the required disclosure involves no statement about human rights abuses or an issuer’s complicity therein.

Appellants also contend that strict scrutiny applies because the disclosure “must be placed on companies’ websites, which typically contain non-commercial as well as commercial speech.” Br.53. But the disclosures at issue in *FAIR* were similarly required to be “carried” by the regulated entities. 547 U.S. at 62. And the Supreme Court’s application of heightened scrutiny in cases where a speaker is forced to “host” or “accommodate” another speaker’s message turns on whether the compelled statements altered the speaker’s pre-existing message. *FAIR*, 547 U.S. at 63-64 (distinguishing *Riley v. Nat’l Fed’n of the Blind of N.C.*, 487 U.S. 781, 796 (1988); *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557, 566 (1995); *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 258 (1974)). Here, as the district court noted (JA0916), issuers need not place their disclosures directly alongside any other speech. Thus, Rule 13p-1 disclosure and any non-commercial speech on issuers’ websites are not “component parts of a single speech” and the disclosure does not “necessarily alter” a pre-existing message (*Riley*, 487 U.S. at 795-96).

**B. Even if some form of heightened scrutiny applies, Section 1502 and Rule 13p-1 survive.**

Appellants argue that in the absence of strict scrutiny, the “intermediate scrutiny” applied to commercial speech restrictions applies. Br.53. Even if true,

Section 1502 and Rule 13p-1 satisfy that standard because they directly and materially advance a substantial government interest in a narrowly tailored manner. *R.J. Reynolds Tobacco Co. v. FDA*, 696 F.3d 1205, 1212 (D.C. Cir. 2012).

Appellants concede that “the government’s interest in promoting peace and security in the DRC is substantial, even compelling.” Br.54. They argue, however, that substantial evidence is required to show that the required disclosure directly and materially advances that interest, and that such evidence is lacking. Br.54. But as the district court concluded (JA0912-JA0913), in the area of foreign relations, “conclusions must often be based on informed judgment rather than concrete evidence.” *Holder v. Humanitarian Law Project*, 130 S.Ct. 2705, 2727 (2010). “That reality affects what [the Court] may reasonably insist on from the Government.” *Id.* at 2728.

Appellants erroneously contend that, unlike in *Humanitarian Law Project* ““there is little to which to defer in this case.”” Br.55.<sup>24</sup> But Congress stated explicitly that the violence in the DRC “warrant[ed]” Section 1502’s disclosure provision. Section 1502(a). And as described in the legislative history, the “United Nations Group of Experts has reported for years how parties to the conflict

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<sup>24</sup> *Boos v. Barry*, 485 U.S. 312 (1988), which appellants cite (Br.56), is inapplicable because the Court was applying “the most exacting scrutiny.” *Id.* at 321.

in eastern Congo continue to benefit and finance themselves by controlling mines or taxing trading routes for these minerals.” 156 Cong. Rec. S3976 (daily ed. May 19, 2010) (statement of Sen. Feingold). Moreover, Section 1502 “is a reasonable step to shed some light on this literally life-and-death issue” (156 Cong. Rec. S3817 (daily ed. May 17, 2010) (statement of Sen. Durbin)) and “a significant, practical step toward” addressing this underlying cause of the conflict (156 Cong. Rec. S3976 (daily ed. May 19, 2010) (statement of Sen. Feingold)).

The State Department concurs. *See* Secretary of State Hillary Clinton, Press Statement on Conflict Minerals in the DRC (July 22, 2010); Under Secretary of State Robert D. Hormats, Statement Concerning Continued Implementation of Conflict Minerals Due Diligence Pursuant to Section 1502 of the Dodd-Frank Act 1-2 (Feb. 28, 2013). And these judgments are further supported by United Nations Security Council resolutions and other international organizations. *See* U.N. Security Council Resolution 1896, at ¶14 (Dec. 7, 2009); U.N. Security Council Resolution 1857, at ¶ 15 (Dec. 22, 2008); OECD Work on Conflict-Free Mineral Supply Chains and the U.S. Dodd Frank Act, *available at* <http://www.oecd.org/daf/inv/mne/48889405.pdf>; The ICGLR Regional Initiative Against the Illegal Exploitation of Natural Resources, *available at* <http://icglr.org/index.php/en/rinr>.

Moreover, Congress's finding that promoting peace and security in the DRC warranted greater transparency is the type of "value judgment based on the common sense of the people's representatives" (*Nat'l Ass'n of Mfrs. v. Taylor*, 582 F.3d 1, 16 (D.C. Cir. 2009)) for which this Court has not required more detailed evidence. Appellants argue that Congress did not "hold hearings on the likely impact of Section 1502 until *after* the law passed." Br.54. But Congress has considered how to promote peace and security in the DRC for years. *See supra* 6-8. And while prior bills differed from Section 1502 (Br.56 n.6), they show an evolution of approach to address the very risks appellants identify. *See* 155 Cong. Rec. S4697 (daily ed. Apr. 23, 2009) (statement of Sen. Feingold). Nor is the post-enactment record as one-sided as appellants contend. *See The Unintended Consequences of Dodd-Frank's Conflict Minerals Provision: Hearing Before the Subcomm. On Monetary Policy and Trade of the H. Comm. on Fin. Servs.*, 113th Cong. 13 (2013) (statement of Sophia Pickles, Policy Advisor, Global Witness); Hormats 2 (Feb. 28, 2013).

Next, appellants argue that Rule 13p-1 is not sufficiently narrowly tailored to accomplish Congress's goals because alternative approaches exist. Br.56-57. But the Supreme Court has "not insisted that there be no conceivable alternative," only that there be a reasonable "'fit' between the legislature's ends and the means

chosen to accomplish those ends.” *Board of Trustees of State University of N.Y. v. Fox*, 492 U.S. 469, 478-79 (1989) (citations omitted). Here, requiring that issuers disclose products that they have not found to be DRC conflict free fits reasonably with the goal of increasing “greater public awareness of the source of issuers’ conflict minerals” to promote peace and security in the DRC. *Adopting Release*, JA0720/3-JA0721/1. And doing so on issuers’ websites, rather than through a list published by the Commission (Br.56-57), is a more effective means.

The Commission also tailored the rule to minimize its First Amendment impact. It revised the language of the disclosure to require only a factual statement, permitted additional explanation and disclosure, and provided a transition period. *Adopting Release*, JA0768/2. Appellants dispute that the ability to add qualifying language tailors the rule (Br.57), but the Supreme Court pointed to just such an accommodation in *Meese*. 481 U.S. at 481. And while appellants cite *Nat’l Ass’n of Mfrs. v. NLRB*, 717 F.3d 947, 958 (D.C. Cir. 2013), to argue that additional disclosure cannot mitigate First Amendment concerns (Br.57), that was not a First Amendment case. Rather, the Court merely analogized to First Amendment principles in holding that an NLRB rule violated the National Labor Relations Act. And in doing so, the Court stated that additional disclosure does not cure a violation “when ‘the complaining speaker’s own message was affected by

the speech it was forced to accommodate.”” 717 F.3d at 958 (citing *FAIR*, 547 U.S. at 63). As discussed above, Section 1502 and Rule 13p-1 do not require issuers to alter the content of a pre-existing message.

\* \* \*

Because petitioners’ challenges fail for the reasons discussed above, vacatur must be denied. In any event, the appropriate remedy is assessed on a case-by-case basis. *See Allied-Signal, Inc. v. NRC*, 988 F.2d 146, 150 (D.C. Cir. 1993).



## CONCLUSION

For the foregoing reasons, the district court's judgment should be affirmed.

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**CERTIFICATE OF COMPLIANCE**

I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 13,899 words, excluding the parts exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and Circuit Rule 32(a)(1).

I also certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally-spaced typeface using Microsoft Word in 14-Point Times New Roman.

/s/ Daniel Staroselsky

**CERTIFICATE OF SERVICE**

I hereby certify that on October 23, 2013, I electronically filed the foregoing Brief of the Securities and Exchange Commission, Appellee, with the Clerk of Court for the United States Court of Appeals for the District of Columbia Circuit using the appellate CM/ECF system. I also hereby certify that I caused eight paper copies of the foregoing to be hand delivered to the Clerk's Office. Service was accomplished on all parties using the CM/ECF system, including Peter Keisler at pkeisler@sidley.com and Julie Murray at jmurray@citizen.org.

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